United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

REPLY BRIEF FOR APPELLANT

353

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,745

CLEVELAND BURGESS,
Appellant

v.

UNITED STATES OF AMERICA,
Appellee

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Criminal No. 903-67

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October 10, 1969

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REPLY BRIEF FOR APPELLANT

STATEMENT

This case comes on for argument at a time when several of its principal issues, affecting the constitutionality of the three Federal narcotics control statutes here involved, are under review by the United States Supreme Court in Minor v United States, No. 189, and Turner v United States, No. 190, October Term 1969. The result of these cases will doubtless affect the instant case, although it appears distinctly possible to counsel for Appellant (who has filed a brief and reply amicus curiae in Turner) that the Supreme Court will not reach all of the issues of constitutionality posed in this case.

In this context, early consideration of the single issue posed by the Appellant which does not involve constitutional claims -- the question of whether Judge Corcoran erred in failing to give a missing witness instruction and in declining leave to comment on the prosecution's failure to call its informer as a witness -- would be both timely and fair. Appellant has, as of the date of this Reply, served two years in prison after a trial he asserts to have been tainted with fatal error. Further imprisonment, pending final resolution of delicate and complex constitutional issues that may well prove to be superfluous to the threshhold error in this case, would thus not serve the interest of justice.

In this reply, Appellant supplements the Argument in his main brief. The Government's claim that Appellant waived claims to a missing witness instruction and to leave to comment on the informer's absence seriously misreads the record. (Arg I, infra)

With respect to the presumptions of statutory violations from possession of narcotic drugs in 21 U.S.C. 174 and 26 U.S.C. 4704a, the sum of the Government's defense is that each presumption satisfied the requirements of due process by resting on an asserted "rational connection" between the fact proved and the fact presumed, Tot v United States, 319 U.S. 463, 467-8 (1943) (Gov. Br. 4-16) and, on that account, escapes condemnation under the Constitution as an instrument of self-incrimination (Gov. Br. 16-23). By its simplicity and straightforwardness, however, this argument claims too

much for rationality and too little for the scope of basic constitutional guarantees. Possession of narcotic drugs gives rise to a range of permissible inferences, other than the predicates of criminality under 21 U.S.C. 174 and 26 U.S.C. 4704a (Arg II). Moreover, even if the instant presumptions are "rational", the practical compulsion they work upon juries to reach guilty verdicts with "no evidence at all" as to key elements of the offense charged, Tot v United States, 319 U.S. at 473 (concurring opinion), violates the Constitution's most fundamental procedural safeguards of fair trial. (Arg III)[1/]

Finally, it is clear that the Government's opposition to Appellant's claim that the written order provision of 26 U.S.C. 4705a operated to defeat his right under the Fifth Amendment to be free from self-incrimination has absolutely no foundation in recent pronouncements of the Supreme Court, which clearly embrace the narcotics seller within their protections. (Arg IV)

1/ The Government makes no reply at all to Appellant's claims that the statutory presumptions in 21 U.S.C. 174 and 26 U.S.C. 4704a violate the Constitution's safeguards of trial by jury (App. Br. 40-1) Nor does the Government reply in any recognizable way--notwithstanding a cryptic and unsubstantiated claim to "treat this contention, infra, at pp. 24-28" (Gov. Br. 16, fn 23) -- to Appellant's contention that 26 U.S.C. 4704a operates to compell self-incrimination (App. Br. 42-52). The Government's brief in Turner in the Supreme Court similarly does not press defenses to these arguments, which are raised in that Court by Appellant as amicus; these issues, nonetheless, remain claims of unconstitutional action brought for proper resolution by this Court.

I. THE GOVERNMENT'S CLAIM THAT THE APPELLANT WAIVED HIS RIGHT TO A MISSING WITNESS INSTRUCTION IS WHOLLY WITHOUT FOUNDATION IN THE RECORD.
(Tr. 63, 135, 321-3, 325, 330-1, 333-5)

The Government's multiple lines of defense to Appellant's claim that Judge Corcoran erred in declining to give a "missing witness" instruction and to allow defense comment with respect to the prosecution's failure to call its informer as a witness are wholly and plainly without substance.

Twice, the Government asserts, the trial judge asked appellant "if he wanted the case reopened for a hearing to determine the absent witness' peculiar availability." (Gov. Br. 2) (emphasis added). To the contrary, however, the record makes plain that the trial judge did no such thing. The record (Tr. 335) could not be clearer that the trial judge determined, erroneously, give the shortest possible shrift to the Appellant's claim that the informer was peculiarly available to the prosecution; to this end, the trial judge was willing to "reopen the case" -- that is, to issue a subpoena to compell the informer to appear, as a witness for the defense.

Repeatedly, (Tr. 333-5), the judge made this, and no other, offer. It was categorically rejected by the defense, not only in the words cited by the Government (with the erroneous qualification set forth in brackets), but also by the flat statement of defense counsel at trial (not mentioned by the Government), made immediately prior to the judge's quoted offer, that "it would be a futile gesture for me to issue or to request a subpoena for his appearance in this court."

(Tr. 335) The defense declined this offer -- an offer to call the informer as a witness for the defense, not an offer to hold a hearing on whose witness he should be.[2/] It is obvious that calling such a hearing was never even a remote possibility to Judge Corcoran.[3/]

Moreover, even if there were a shred of plausibility to the Government's claim, familiar principles relating to the doctrine of waiver render that claim without merit. It is axiomatic that an intention to relinquish known rights must plainly appear before a

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2/ Nor does record support the Government's claim (Gov. Br. 3) that the judge had given full consideration to the defense's position since the prosecution had previously "pressed" the government for a "peculiar availability hearing" respecting another witness. The full record suggests that the prosecution's "pressure" was little more than rhetorical musing (Tr. 321-323) and that moreover, the judge's reaction <u>there</u>, to suggest a subpoena, was not the least bit indicative that the judge acted <u>here</u> in accordance with appropriate judicial standards.

3/ It is obvious too that the Government grossly overstates (Gov. Br. 2) the extent of its generosity at trial, when it states, with respect to its informer, that his "name and address were given to appellant at trial." There are obvious difficulties in finding a man variously identified as Danny Cox (Tr. 63) and Daniel Cole (Tr. 135) -- indeed the Government's trial attorney acknowledged "it comes out in various forms" (Tr. 325) -- whose last known address is given in terms of an entire city block. Indeed, Agent Fialkewicz, the agent who apparently ran the informant, stated that he did not know where the informant could currently be found (Tr. 135).

court will find that a party has waived a right or defense. Universal Gas Co. v. Central Illinois Public Service Co., 102 F.2d 164 (C.A. 7th, 1939). The "essence of a waiver, as indicated by its definition, is the voluntary and intentional relinquishment of a known right, claim or privilege." 28 Am.Jr. 2d 842, Sec. 158, "Estoppel and Waiver," Bennecke v. Connecticut Mutual Life Insurance Co., 15 Otto (105 U.S.) 355 (1882). Lucas v. Brooks, 18 Wall. (85 U.S.) 436 (1873). Cordova v. Hood, 17 Wall. (84 U.S.) 1 (1873). Reynolds v. Douglass, 12 Pet. (37 U.S.) 497 (1838). Moreover, "Mere negligence, oversight, or thoughtlessness does not create a waiver" 28 Am. Jur. 2d 842, citing Aisens American Portland Cement Works v. Degnon Contracting Co., 222 N.Y. 34, 118 NE 210 (1917), in which case the court articulated a high standard which conduct must meet to constitute waiver as a matter of law - only where the words or actions of a party "leave no opportunity for a reasonable inference to the contrary." 118 NE at 210. Here, indications in the Record are ample that a waiver was not intended.

Nor is the Government's claim that the informer could not have elucidated any material issues worthy of extended comment. Obviously, Judge Corcoran must have thought to the contrary, or he would not have ruled, as he did, that the testimony of the informer would have been material. (Tr. 330-1) Moreover, the Government is misled by the colloquy of its trial attorney and the judge (Tr. 336) into believing that the "only issue at trial was whether or not appellant was the individual who passed the heroin to the Government agent."

(Gov. Br. 3-4).4/ The Government had the burden of proof on all issues necessary to make out guilt, and Appellant's main brief (App. Br. 12-14) indicates the key issues to which the informer's testimony would have been pertinent. Any other conception would deprive Appellant of a "substantial right." U.S. v Jackson, 257 F.2d 41 (C.A. 3, 1958).

4/ The Government's statement that "four trained narcotics agents had seen a photograph of the appellant before the unlawful transactions" (Gov. Br. 4) cannot be allowed to influence the determination of any issue in this case. The Record references offered by the Government give absolutely no substantiation to this claim, which, has no foundation in any testimony in the Record.

II. BOTH EMPIRICALLY AND LOGICALLY, THE STATUTORY PRESUMPTIONS OF 21 U.S.C. 174 AND 26 U.S.C. 4704a FAIL TO SATISFY THE TEST OF RATIONALITY REQUIRED BY DUE PROCESS OF LAW.

On balance, the Government's attempt to refute Appellant's arguments with respect to the irrationality of the presumption of foreign importation of heroin accepts and confirms the pattern of logically valid alternative origins outlined for heroin in the Appellant's brief (App. Br. 32-36)[5/] Moreover, Government statistics aggregating thefts of the three regulated narcotics from which heroin may be derived -- medical opium, morphine, and codeine[6/] -- suggest the possibility that the proportion of domestically processed heroin from sources not unlawfully imoorted is far in excess[7/] of the "less than one percent of the estimated 1,500 kilograms of heroin smuggled into the United States annually" claimed by the Government. (Gov. Br. 9).

5/ In Turner the Government has conceeded the irrationality of the presumption with respect to knowledge of foreign importation of cocaine, and prayed for reversal on that count (Gov. Br., Turner, pp. 28-32). The Government's contention was based on the large amount of cocaine it recognized is stolen each year (and hence available in the illicit drug traffic) that is likely to have been processed in the United States. In the light of the parallel cultures of cocaine and heroin, this distinction presumes an untenable line between heroin and cocaine -- untenable in the light of Congressional intent (to bar both drugs) and of rational inference (from the situation that both drugs can be both domestically processed and lawfully imported).

6/ There are authoritative indications, in contrast to the position taken here by the Government, Gov. Br. 8, fn. 8, that the chemical sources of heroin include the widely distributed pain-killer codeine, in addition to medical opium and morphine. Thus the Permanent Central Opium Board reported in 1953, as follows:

"The Board learned that, in 1951 and for the first time, codeine had been converted into morphine. The government which reported

this operation announced that 26 kg. of codeine had been used to produce 18 kg. of morphine, which is equivalent to a yield of about 70 percent." Permanent Central Opium Board, "Legal Trade in Narcotics in 1951" 5 Bulletin on Narcotics 48, 50 (No. 1, Jan-March, 1953) (United Nations)

7/ Applying appropriate conversion factors, as stated by the Government (Gov. Br. 8, fn. 9) and drawn from the previous footnote, to the quantities of regulated narcotics reported stolen in the year 1967 (Gov. Br. 35, Appendix) yields the following quantities of heroin able to be so produced --

Source	Quantity Stolen (kg)	Conversion Factor	Heroin (kg.)
Medical opium	9.7	12.9/1	.8
Morphine	7.8	10.2/10.2	7.8
Codeine	81.8	26/18*	57.3
		TOTAL	65.9 kg

*(Conversion to Morphine)

Moreover, a recent Federal campaign to impose restrictions on the sale and dispensation of common cough syrups (containing codeine) and paregoric[8/] points to an additional source of supply as handy as the front counter of the corner drugstore or supermarket. Consequently, the domestically manufactured supply of heroin may be even greater than that assumed from theft alone. For a recent conviction for so manufacturing a narcotic drug by culling opium from paregoric, see Bibb v. Commonwealth, 113 S.E.2d 798, 201 Va. 799 (1960).

Thus, while it is not surprising that a great volume of heroin is seized by Federal agents at ports and borders and by cooperating agents overseas each year (in the light of the deployment of such

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8/ On September 30, 1969, Mr. John E. Ingersoll, Director, U. S. Bureau of Narcotics and Drug Abuse stated that "hundreds of thousands" of Americans are seriously misusing such preparations for their narcotic properties, indicating that Federal regulations effective October 10, 1969 will henceforth require that cough syrups containing low percentages of codeine and paregoric be sold only by registered pharmacists, to persons over 18 (unless by prescription), and in limited quantities. The New York Times, October 1, 1969, p. 19. In his prepared speech to which the above press-conference remarks relate, Mr. Ingersoll also asserted that "many new dangerous substances have found their way into the illicit market." He said that,

> "The discovery and production of these substances is a classic example of American know-how and ingenuity. Whoever says that the age of the small entrepreneur is a thing of the past in America, need only look at the drug 'scene' as it exists today for contradiction." Ingersoll, "New Horizons in Federal Control of Drug Abuse", U. S. Bureau of Narcotics and Dangerous Drugs, September 30, 1969 (xerox), p.7.

agents and the visibility of the traffic they monitor)[9], such statistics have, of course, absolutely no validity as a basis for rational inference regarding the amount of heroin domestically manufactured.[10] Nor is it surprising that the Director of the Bureau of Narcotics can report that "we have not found a single clandestine laboratory for many years" (Gov Br. 8), since kitchen laboratories are so notoriously easy to hide and since it cannot properly be assumed that traffickers in narcotics are less sophisticated today than they may once have been.[11] More than words, perhaps, it is appropriate to look to the Government's actions in judging the seriousness with which the Government views the prospect of domestic

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9/ In the year 1967, 70.74 kg. of heroin was seized at U. S. ports and borders, while 170.105 kg. was seized overseas in cooperation with the U. S (See U.S.) Bureau of Narcotics, Report on Traffic in Opium and Other Dangerous Drugs (1967) p. 43.

10/ Thus the Government's claim that "The conclusion that heroin is unlawfully imported could properly be reached by judicial notice" (Gov. Br. 12, fn. 21) is a gross overstatement. Appellant believes, to the contrary, that if the Government were to attempt to show this strained conclusion by testimonial evidence, such evidence would be the proper subject of a motion to strike as irrational and without substantial foundation.

11/ On the other hand, the recent lack of success of the Government's enforcement agencies is not mirrored in the findings of independent scholars; thus Dr. W. Z. Guggenheim has recently reported the appearance of a grey colored heroin in New York City since August 1964 which clumps rapidly after boiling, which, Dr. Guggenheim assents "is claimed to be produced locally." Guggenheim, "Heroin:History and Pharmacology," 2 International Journal of the Addictions 328,330 (1967).

manufacture of heroin; in this context, the recent prosecution in U.S. v. Haden, 397 F.2d 460 (C.A. 7, 1968), involving an effort to manufacture heroin from morphine sulfate, confirms the thoroughgoing realism of domestic manufacture as a source of heroin.

Beyond this point, the prospect of domestic manufacture being thus substantiated as a logical source of heroin, precise measurement is not needed to defeat the rationality of the presumption of foreign importation. In Tot, for example, The Supreme Court was not concerned to determine the specific likelihood of firearm transactions occurring intrastate or prior to the effective date of the statute. Nor in U.S. v. Romano, 382 U.S. 136 (1966) was the Supreme Court interested in ascertaining the specific probability that persons present at stills might be engaged in activities other than those prohibited by the statute. In those instances, as here, substantiation of the existence of a realistic alternative to the fact-presumed was sufficient to defeat the statutory inference.

However, even if it be assumed that the presumption of illegal importation is valid, Leary v. U.S., 395 U.S. 6 (1969) teaches that the further presumption of 21 U.S.C. 174 concerning knowledge of illegal importation must fall. In Leary it was pointed out that--

> "Once it is established that a significant percentage of domestically consumed marihuana may not have been imported at all, then it can no longer be postulated, without proof, that possessors will be even roughly aware of the proportion actually imported." 395 U.S. at 46. (emphasis added)

With respect to domestically consumed heroin, the foregoing analysis suggests that the test is satisfied and that proof must consequently

be supplied to support the presumption of knowledge. Seeking to discharge this burden, the Government's reliance on "widespread notoriety in the news media--both on television and in the press" (Gov. Br. 14)--is patently inadequate and, indeed, misleading.

To the contrary, the indications are legion that lower-echelon participants in heroin traffic are by and large drawn from the lowest levels of society--poor, uneducated, and ethnically disadvantaged. See for example, Hearings before a Subcommittee of the House Ways and Means Committee, "Traffic in Narcotics," 84th Congress, 1st Sess. (1955), pp. 1301-1507 passim; U. S. Bureau of Narcotics, Report on Traffic in Opium and Other Dangerous Drugs (1967), p. 49. In 1967, the President's Commission on Law Enforcement and The Administration of Justice reported:

> "In the states where heroin addiction exists on a large scale, it is an urban problem. Within the cities it is largely found in areas with low average incomes, poor housing, and high delinquency. The addict himself is likely to be male, between the ages of 21 and 30, poorly educated and unskilled, and a member of a disadvantaged ethnic ethnic minority group." The President's Commission on Law Enforcement and The Administration of Justice, Report: "The Challenge of Crime in a Free Society", p. 212-3 (1967).

Authoritative studies indicate that heroin users neither know nor care much about their drug, or indeed about the world in which they live. See Blum, "Mind-Altering Drugs and Dangerous Behavior: Narcotics", in President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Narcotics and Drug Abuse (1967) pp. 50-52; White House Conference Panel on Drug Abuse, Report, p. 290 (1962); and

Chien, The Road to H (1964), pp. 52-3.

In sum, the conclusion flatly stated by the Court of Appeals for the Tenth Circuit in Griego v. U. S., 298 F.2d 545, 849 (1962), is also applicable here, that:

> "it is probable that many narcotic offenders can testify truthfully that they had no knowledge of unlawful importation. Those so engaged are not concerned with the primary sources of the contraband commodity."

Thus the presumption of knowledge of unlawful importation cannot be supported by a finding that most heroin possessors know either of the origins of their drugs or of heroin in general. Leary v. United States, 395 U. S. at 47. By this token, the presumption of knowledge is clearly irrational.

* * * *

The Government also asserts -- though the question had not previously been put in issue by the Appellant -- that the statutory presumption contained in 26 U.S.C. 4704a satisfies the requirements of due process, since it too rests on a purportedly rational base, i.e. that since heroin is neither legally produced nor imported in the United States, "there would be no way to acquire it from a stamped package" (Gov. Br. 16). Unquestionably logical though that simple conclusion may be, it bears no relationship to the plain language of the statute.

For the statute does not bar the acquisition of a narcotic drug (other than in or from a stamped package); it applies more narrowly

to make it unlawful for anyone to "purchase, sell, dispense, or distribute" (emphasis added)[12/] such a drug. The unavailability of heroin in a stamped container has absolutely no bearing whatsoever on whether or not the Appellant purchased such a drug (or did any of the other specific acts necessary to constitute a violation, acts which the Government appears to discount by concentrating on acquisition alone); indeed, the statute's recognition of three alternative modes of passing on a narcotic drug (along with the exemptions to the coverage of Subsection (a) set forth in Subsection (b) of Section 4704) surely suggests that there are numerous plausible ways -- other than purchase -- by which Burgess may have acquired the drugs. Under Tot, Romano, and Leary, therefore, the inference of violation of 26 U.S.C. 4704a from mere possession is arbitrary, irrational and inconsistent with due process of law.

12/ Illustrating the indifference to procedural fairness that has overtaken the statute's application, the Government erroneously states, tautologically, that the petitioner was convicted "of having knowingly purchased, possessed, and distributed heroin not in or from the original stamped package." (emphasis added) (Gov. Br. 15) Any such conviction would necessarily be void, ipso facto, as not in accordance with the authority of the statute. Here the Court instructed the jury that an "essential element of the offense" is that the defendant knowingly purchased, sold, dispensed or distributed a narcotic drug." (Tr. 359) The presumption from possession had no rational bearing on any of these "essential" elements; moreover, even if independent evidence of any such act were before the jury, the unconstitutionality of the presumption on which the case was submitted to the jury requires that the conviction be set aside. Stromberg v California, 283 U.S. 359 (1931).

III. Aside from Their Irrationality, The Instant Presumptions Operate to Deprive The Defendant of A Fair Trial

In its brief, the Government takes the position that if a rational connection exists between the fact proven and the fact presumed, statutory presumptions wholly satisfy the requirements of due process and, moreover, compel self-incrimination no more than any evidence justifying the rational inference of guilt. (Gov. Br. 16-17) Rationality is, indeed, a sine qua non of due process, but it is not, nor has it ever been, sufficient basis for consistency with the commands of the Constitution. Long ago, this Court held in Bailey v. Alabama, 219 U.S. 219 (1910) that

> "It is apparent that a constitutional prohibition cannot be transgressed indirectly by the creation of a statutory presumption any more than it can be violated by direct enactment. The power to create presumptions is not an escape from constitutional restrictions." 219 U.S. at 239.

Thus the dilemmas worked by these presumptions must be measured independently against substantive constitutional rights of fair trial procedure.

Bailey teaches, and subsequent cases confirm, that the constitutionality of a statutory presumption must be appraised in the light of its practical effects. In Bailey, where a state statute provided that failure to perform personal services after receiving payment therefor was prima facie evidence of intent to defraud, the Supreme Court reached the conclusion that the statutory presumption contravened a constitutional right upon the following practical

construction--

> "The point is that...the statute authorizes the jury to convict. It is not enough to say that the jury may not accept that evidence as alone sufficient; for the jury may accept it, and they have the express warrant of the statute to accept it as a basis for their verdict." 219 U. S. at 235.

In this context, the presumption in 21 U.S.C. 174 similarly authorizes the jury to convict, though there is "no evidence at all", Tot v. U. S., 319 U. S. at 473 (concurring opinion) with regard to any of the multiple possible origins of the drugs in the defendant's possession or with regard to his knowledge or lack thereof of the many furtive hands through which it may have passed. Similarly, even the presumption in 26 U.S.C. 4704a, authorizing conviction for a number of inferred acts, is sufficiently unrelated to the fact of possession to invoke the requirement of procedural fairness applied in Tot and articulated in Leary that

> "because of the danger of overreaching it was incumbant upon the prosecution to demonstrate that the inference was permissible before the burden of coming forward could be placed upon the defendant." 395 U.S. at 45, citing Tot, 319 U.S. at 469, and distinguishing Yee Hem v. United States, 268 U.S. 178, 184 (1925).

Thus, statutory presumptions cannot work to shift the burden of proving guilt from the prosecution to the defendant, as do the presumptions here in question, without violating due process of law. Morrison v. California, 291 U.S. 82, 96-7 (1934); Tot v. United States, supra; Speiser v. Randall, 357 U.S. 513, 535-6 (1958); Dombrowski v. Pfister, 380 U.S. 479, 496 (1965); U.S. v. Romano, 382

U.S. 136, 144 (1965). Leary v. United States, supra, 395 U.S. at 36, fn. 64 and authorities cited. Nor can these presumptions constitutionally operate to deprive a defendant of other protected rights, U.S. v. Gainey, 380 U.S. 63, 83-88 (dissenting opinion), Leary v. U.S., 395 U.S. at 55-6 (concurring opinion)--specifically, in this case, his rights to trial by jury and to freedom from self-incrimination. (App. Br. 37-42)

IV. The Plan and Purpose of 26 U.S.C. 4705a Directly Transgress the Fifth Amendment's Protection against Self-Incrimination.

When all is done, the Government has not contested the Appellant's claims that compliance with the written order form procedure of 26 U.S.C. 4605a requires self-incriminatory record-keeping. Instead, its defense is based on the unlikelihood that any unlawful seller would ever be faced with the practical requirement to complete such records, and on the premise that in any event, the dilemma may be avoided by not engaging in illicit sales of narcotics. The Supreme Court has, however, disregarded this sophistic defense against the application of the Fifth Amendment in Marchetti v. United States, 390 U.S. 39 (1968), where the court said,

> "The constitutional privilege was intended to shield the guilty and imprudent as well as the innocent and foresighted; if such an inference of antecedent choice were alone enough to abregate the privilege's protection, it would be excluded from the situations in which it has historically been guaranteed, and withheld from those who most require it." 390 U.S. at 51."

With this the Supreme Court went on to reject the notion that by embarking on a course of illegal activity the defendant could thereby be held to have waived his constitutional privilege against self-incrimination.

Furthermore, Leary, supra, confirms that the Fifth Amendment's reach is not confined to testimonial invocation alone but extends to "the right not to be criminally liable for one's previous failure to obey a statute which required an incriminatory act." 395 U.S. at 28.

Moreover, the Supreme Court in Leary was also careful to disregard the claim made by the Government there that in actual operation the dilemma was unlikely to arise, looking instead to the real intent of Congress and the practical effect of the overall statutory scheme, to force the defendant to register.

Thus, for the same reasons so thoroughly condemned by the Supreme Court with respect to statutes compelling disclosure of illegal wagering, transactions in firearms, and purchase of marijuana, the instant prohibition must also fail.

CONCLUSION

For the foregoing reasons, and for the reasons emphasized in Appellant's main brief, Appellant urges this court to reverse the conviction.

Respectfully submitted.

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(Appointed by this Court)

CERTIFICATE OF SERVICE

I hereby certify that I have this 10th day of July, 1969, served a copy of the foregoing Brief for Appellant, upon the United States Attorney by personal delivery.

Steven R. Rivkin

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Issues Presented

I. Did the trial judge's denial of the defense request for a "missing witness" instruction on, and his refusal to permit defense counsel to comment with respect to, the inference that testimony of an eyewitness informer would have been adverse to prosecution constitute an abuse of judicial discfetion?

II. Did conviction for facilitating the concealment of narcotic drugs known to have been imported contrary to law, pursuant to 21 U.S.C. §174, violate the due process and self-incrimination provisions of the Fifth Amendment and constitutional protections of trial by jury, where the judge instructed the jury, according to the presumption set forth in said statute, that mere possession of narcotic drugs is sufficient to convict thereunder?

III. Did convictions for sale of narcotic drugs not in the original stamped package, pursuant to 26 U.S.C. §4704a, and for transfer of narcotic drugs without receipt of a written order form, pursuant to 26 U.S.C. §4705a, violate the Fifth Amendment, where said sections, individually and as part of a statutory scheme, compel the defendant to reveal incriminating information?

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STATEMENT OF THE CASE*

Appellant Cleveland Burgess was convicted on November 19, 1967 in the United States District Court for the District of Columbia, after trial by jury (Criminal No. 908-67), on six counts for narcotics violations arising from two alleged sales of heroin. With respect to each sale, Appellant Burgess was convicted for transfer of narcotic drugs without a written order on an official order form, 26 U.S.C. §4705a (Counts 1 and 4), sale of narcotic drugs not in or from the original stamped package, 26 U.S.C. §4704a (Counts 2 and 5), and facilitating the concealment of narcotic drugs knowingly imported

*"References to Rulings": None

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BRIEF FOR APPELLANT

STATEMENT OF THE CASE*

Appellant Cleveland Burgess was convicted on November 19, 1967 in the United States District Court for the District of Columbia, after trial by jury (Criminal No. 908-67), on six counts for narcotics violations arising from two alleged sales of heroin. With respect to each sale, Appellant Burgess was convicted for transfer of narcotic drugs without a written order on an official order form, 26 U.S.C. §4705a (Counts 1 and 4), sale of narcotic drugs not in or from the original stamped package, 26 U.S.C. §4704a (Counts 2 and 5), and facilitating the concealment of narcotic drugs knowingly imported

*"References to Rulings": None

contrary to law, 21 U.S.C. §174 (Counts 3 and 6). On January 19, 1968, Burgess was sentenced by Judge Corcoran to the statutory minimum terms, five years, on Counts 1 and 4, and 3 and 6, and on Counts 2 and 5, to a one-to-three term, all sentences to run concurrently.

A. Testimony

At the trial, the prosecution introduced testimony from four Federal Narcotics Agents (Collins, Fialkewicz, Stutman and Steadman) to show that on two separate occasions, March 22 and March 24, 1967, Appellant Burgess met Agent Collins within or in the vicinity of a restaurant, the Pig and Pit, located near the corner of Florida Avenue and Sixth Street, N.W., Washington, D.C. As set forth in the opening statement of the government's counsel (T. 6-9), the prosecution attempted to show that Agent Collins was within the restaurant at about 1 p.m. on March 22 when he purchased a quantity of capsules containing heroin from the Appellant Burgess; two days later, the prosecution contended, Collins was seated at a table in the restaurant, whence he was hailed by Burgess to a car where a similar transaction took place. In both instances, according to the prosecution, Collins did not give Burgess a written order form and no tax stamps were affixed to the capsules or any package containing them.

Testimony by Agent Collins was the only direct evidence to

support the charges that narcotics had been sold, without bearing tax stamps, and without proffer of a written order. Agent Collins testified that on the first occasion, he had been seated at a window table of the restaurant, when Burgess "came in the store and I was introduced to him as a heroin customer." (Tr. 15). Acknowledging that there was another person present (Tr. 15), Collins testified that Burgess instructed him to go to the rear of the "store", whereupon "we took a seat near the telephone booth" and discussed price. (Tr. 17). After agreeing on a price, Burgess gave Collins a small envelope containing capsules, and the transaction was completed. The two agreed to meet again for another transaction (Tr. 18). Collins testified he gave no written order, and that the capsules he purchased bore no tax stamps (Tr. 22-23). The whole encounter took five to ten minutes (Tr. 79).

Two days later, Collins testified, he returned to the restaurant and sat at the same forward table, when Burgess drove up alone, alighted from a car, and motioned to Collins to join him. Another person was present in the restaurant with Collins, who exited with him. The two got into Burgess' car, Collins in the back and the other person in the front, next to Burgess who drove (Tr. 26-27). After driving a distance of one short block, Collins asked Burgess "if he had the package and he said he did". (Tr. 27). Collins testified Burgess reached under his seat for an envelope;

he handed the envelope to Collins; Collins examined the envelope and found it to contain capsules, whereupon he gave Burgess money. (Tr. 27). Collins gave nothing besides money for the envelope and saw nothing in the way of stamps on the package or capsules. (Tr.29). The whole transaction took ten minutes. (Tr. 79).

On cross examination, Agent Collins indicated that the additional person present at each transaction was the same person, an informant, (Tr. 71), whom he identified as one Danny Cox (Tr. 63). None of the other narcotics agents was in the restaurant (Tr. 69-70). Collins testified, on redirect examination, that the informant was the only person he knew of who saw the "actual transaction", his companion agents being out of the field of view of any "hand to hand." (Tr. 32).

Three other agents offered circumstantial evidence of the incidents in question. On March 22, according to Agent Fialkewicz' testimony, he was parked in a government vehicle with Agent Stutman in the vicinity of the restaurant and saw Burgess arfive in a car, enter the restaurant and leave (Tr. 36-38). On March 24, Fialkewicz and Agent Worden were similarly parked; they saw Burgess drive up in a different car, alight "just for a second," wave to Collins, "who was in the Pig and Pit with an informer"; both Collins and the informer subsequently joined Burgess in his car, Agent Collins getting into the rear seat and the informant getting

in front. As the trio drove off, Fialkewicz said he followed, trailing another car full of agents who were also following Burgess' car. (Tr. 92-93).

Subsequently, on cross-examination, Fialkewicz named the informer as Daniel Cole (sic), giving his approximate address in the 700 block of Morton Avenue. He indicated that he had not been in contact with the man for a month and a half, though prior to that time he had telephone and face to face contact with him. (Tr. 135-7).

With regard to events of March 24, Agent Stutman placed Collins and the informant together--entering the restaurant (before Burgess arrived), exiting together on Burgess' signal and entering his car, and exiting the vehicle (Tr. 159, 161). While trailing the trio in Burgess' car, he testified, he saw "Burgess hold his hand back like this (indicating) over the seat and I observed Agent Collins join hands with him." (Tr. 160).

Agent Steadman testified that on March 22 he was parked in a car on Bohrer Street near Florida Avenue with Agent Morris and saw Burgess drive by twice over a fifteen minute period, before and after the time of the alleged transaction. (Tr. 192-194). With respect to the events of March 24, he confirmed that he, with Agent Stutman, was trailing Burgess' car, that the car contained Burgess, the informant and Collins, and that Burgess and Collins "joined hands." (Tr. 196). On cross-examination, however, he admitted that

he had never received any "signal that an illegal transaction had taken place...", and he flatly stated,

> "No, sir, I have never seen anything that I could testify that was illegal that he [Burgess] did while I was watching." (Tr. 233).

At the close of the government's case, the defense moved for a directed verdict of acquittal, on grounds that the prosecution had introduced insufficient evidence to go to the jury, emphasizing that Agent Collins' testimony was the sole evidence against the defendant. The motion was denied. (Tr. 240-1). The defense witnesses Parks, Jones, and Neal then testified that, together with Burgess, they had taken a two-day trip to New York City to see the Cassius Clay-Zora Folley prize fight during the period when the alleged transactions were said to have taken place, thus establishing an alibi defense. (Tr. 244-310)

B. The Missing Witness Issue

At the close of testimony, defense counsel indicated to Judge Corcoran that he would argue that the jury should infer from the failure of the government to call the informer Cox or Cole that the testimony would be adverse to the government, and he requested the judge to give a missing witness instruction. Defense counsel asserted that the informer was the only "eyeball witness" to both transactions, having accompanied Agent Collins and Burgess to the telephone booth at the rear of the restaurant beyond the field of view of any of the other agents, and, with respect to the second transaction,

having been within Burgess' car, where all the trailing agents could observe was "a handshake". (Tr. 325-3). Defense counsel suggested the prosecution knew both the identity and the whereabouts of the informant, arguing that "To assume that we know who Cole is is in fact to assume the truth of the indictment," which he submitted would be improper. (Tr. 328).

Judge Corcoran's initial response was to express uncertainty as to whether Collins' testimony had indicated the informant to have been an "eyeball witness" to the first transaction at the rear phone booth, and that as to the second transaction, "his testimony would only be cumulative because two or three agents testified that they saw the transaction happen". (Tr. 328).

After a recess in which the transcript of Collins' testimony had been examined, Judge Corcoran ruled that, although the transcript was a little bit vague as to whether the informer had been present at the first transaction, the informer's testimony would be "material" if only in the light of elucidating Burgess' defense of alibi. (Tr. 330-1). Notwithstanding the materiality of the informer's testimony, Judge Corcoran went on to find that the government's identification of the name and former whereabouts of the informer during the course of the trial had made the man "available to anybody who wants him." (Tr. 332). He said:

> "I think that was sufficient identification in view of the materiality of this witness to put you on notice as to what

> the availability of this witness might be and to make proper demands on the Government, if you couldn't find him, to produce the witness for your use. I don't think you can go to the end of the trial without making any request, knowing who the witness is, what his whereabouts are and then put the burden on the Government to produce--rather to ask for a missing witness instruction which gives you the right to comment. I think this man is still available to anybody who wants him." (Tr. 331-2).

Over protests of defense counsel that government identification had not been sufficiently precise for the defense to find the informer, the Court chided defense counsel for not having "asked me to issue a subpoena or try to go out and find the man." (Tr. 332-2). Judge Corcoran said he would "wager [this informer] could be found within 24 hours.

When defense counsel renewed his objection that for the defense to have sought to subpoena the witness for testimony would have been "entirely in violation of our own defense" (Tr. 334), Judge Corcoran demurred, stating that the informer's pertinence to the alibi defense could have led the informer to testify "' I have never seen this man. I wasn't with him on the 22nd'". (Tr. 334). When defense counsel argued that so confining the relevance of the informer's testimony to the alibi defense would shift defendant's presumption of innocence--"I submit it is the responsibility of the Government to prove its case, not my responsibility to disprove it." (Tr. 334-5)--the Judge closed argument by reiterating his finding that the informant was not peculiarly available to either side.

In further colloquy between the Judge and the Government's attorney, after the ruling with respect to availability of the informant had been made, the prosecution made the following representation:

> "I would also like to put on the record what I mentioned to Your Honor in Chambers,* which is that another reason that the Government declined to call this witness was that I understood from the officers that there was some danger of physical danger to the witness should he come in to testify in this case. That was the main reason why I did not call him in this case. I thought his testimony was cumulative and the agents told me that they feared for his safety were he to testify." (Tr. 337).

Thereupon, in response to defense counsel's request for clarification as to whether absent the requested instruction, the defense could argue to the jury that the government's failure to call the missing witness might reflect adversely on its case, the Judge ruled that comment would nonetheless be permissible. Following recess, the Judge revised his ruling permitting comment

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* Subsequently, defense counsel noted that he had not been present when such representation was made to the Judge, and moved for a mistrial. Judge Corcoran indicated that no "Chamber proceeding" had taken place, and that casual encounter had occurred when both government counsel and the reporter were examining transcript notes, prior to his ruling on defendant's motion for the instruction. The judge said: "There was nothing of substance. There was no discussion to reflect in any way upon the case. I assure you of that." (Tr. 343-4). The Judge did not rule on counsel's mistrial motion.

upon the basis of the then recent holding in Wynn v. U.S., App.D.C. , 397 F.2d 621 (1967), holding that "if we are not going to give the instruction, we are not to permit the comments" (Tr. 341), to which both the defense and the prosecution took exception (Tr. 340-6).

C. Instructions

In instructing the jury with respect to the requirements necessary for conviction under 26 U.S.C. §4704, the Judge made reference to the statute's provision that possession of a narcotic drug without appropriate tax paid stamps is prima facie evidence of violation. Said provision was stated to mean that if the prosecution shows beyond a reasonable doubt that the defendant had possession of such drugs, the jury may, but is not required to, find the defendant guilty on such proof alone. (Tr. 361).

With respect to the violation alleged of 21 U.S.C. §174, the Judge stated that proof beyond a reasonable doubt is necessary for four elements of the offense--that the defendant facilitated the concealment or sale of a drug; that the defendant did so fraudulently and knowingly; that the drug had previously been imported contrary to law; and that the defendant knew of such unlawful importation. With respect to the third element, unlawful importation, the Judge informed the jury that only licensed narcotic drugs may be brought into the United States lawfully and that no

crude opium may be brought in for the purpose of manufacturing heroin. The judge also emphasized that the government must prove that the defendant had known the narcotic drug to have been imported contrary to law. (Tr. 362-4)

However, the judge also emphasized the statutory presumption that possession of a narcotic drug is sufficient to convict under 21 U.S.C. §174, unless the defendant explains possession to the satisfaction of the jury. Thus, he charged, if the government has shown that the defendant had possession, the jury may, but is not required to, find the defendant guilty from possession alone. The judge cautioned, however, that this rule did not change the presumption of the defendant's innocence or any burden of proof, and that the government must continue to prove every element charged beyond a reasonable doubt. (Tr. 365).

ARGUMENT

I. THE TRIAL JUDGE's DENIAL OF DEFENSE COUNSEL's REQUEST FOR A MISSING WITNESS INSTRUCTION AND HIS REFUSAL TO PERMIT COMMENT TO THE JURY ON THE PROSECUTION's FAILURE TO CALL ITS INFORMER CONSTITUTED AN ABUSE OF JUDICIAL DISCRETION.

(Tr. 15, 18, 26-7, 63, 80-82, 93, 135, 138, 159, 161, 196-7, 323, 330-1, 332, 334-5, 337, 343-4, 356-7)

Ever since the holding of the United States Supreme Court in Graves v. U.S., 150 U.S. 118 (1893), the rule has been unquestioned that, "if a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact

that he does not do it creates the presumption that the testimony, if produced, would be unfavorable." 150 U.S. at 121. This court has frequently recognized the "missing witness" principle, and has applied it as a guide to both comment of counsel and judicial instructions. See Wynn v. United States, App.D.C. , 397 F.2d 621 and cases cited at 625, fn. 19. Most recently, this Court has given continuing life to the rule in its opinions of February 19 and July 10, 1969 in Stewart v. U.S. (No. 20,933), where the Court has laid down both substantive and procedural safeguards for assuring itsproper applicability.

In declining to give the missing witness instruction requested by the counsel for Appellant Burgess with respect to the government's failure to call its informant Cox or Cole and in refusing to allow comment thereon, the trial judge violated the considerations of evidentiary fairness that have given rise to the missing witness rule, failing moreover to make necessary inquiry to ensure proper application of the rule. By denying a permissable inference of cardinal moment to Appellant Burgess' case, the trial court committed prejudicial error. The conviction should therefore be reversed.

A. The Role of the Informer

Testimony of all of the prosecution's agent witnesses established that the informer was present throughout both alleged

sales of heroin (Tr. 15, 26-7, 63, 69-70, 71, 72, 93, 159, 161, 196, 197), and that no other person was known to have witnessed the precise alleged transactions (Tr. 70, 32), including (except for Collins, a participant) themselves. The judge recognized that the informer was an eyewitness to the March 24 transaction (Tr. 323), though he felt the transcript of Agent Collins' testimony was "a little bit vague" about whether he was present at what transpired at the telephone booth during the March 22 sale.

By the same token, the only testimony in the case as to the key elements necessary for conviction was from Agent Collins. Those elements were: with respect to facilitating the concealment of narcotic drugs under 21 U.S.C. §174, that Burgess had heroin in his possession; with respect to selling narcotic drugs other than upon written order, pursuant to 26 U.S.C. §4705a, that Burgess sold*

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* Although coverage of 26 U.S.C. §4705a is more broadly defined than a mere sale--covering sale, barter, exchange, or gift--the trial judge gave the jury a limited instruction in which sale for consideration was one of two key elements for the prosecution to prove beyond a reasonable doubt. (Tr. 356-7). The prosecution's case indicated that, although marked money was allegedly given to Burgess in both transactions, that money was never traced to the defendant (Tr. 74-75). Thus, Collins' testimony that he actually paid money to Burgess (Tr. 18, 27) was the only evidence as to a central element of the charge.

heroin and that Collins did not give him a written order; with respect to possession * of a narcotic drug without appropriate stamps, pursuant to 26 U.S.C. §4704a, that Burgess did indeed possess such drugs and that they did not have stamps on them.

As to these elements of the charges against Burgess, Collins alone gave testimony. The other agents merely corroborated the proximity of Burgess, Collins and the informer. Had the informer testified, he could have "elucidated" whether Burgess had narcotics in his possession, whether a sale had taken place, whether tax stamps were upon the capsules or their packages while the narcotics were in Burgess' possession, whether Collins gave a written order to Burgess in connectionwith the transfer.

No witness testified to these key elements of the transactions necessary for conviction, other than Collins, and his testimony was directly controverted by Burgess' alibi defense.

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* Since possession is, by the terms of §4704a prima facie evidence of a violation, conviction did not rest explicity on the jury's finding that Burgess had either purchased, sold, dispensed or distributed narcotic drugs. Nonetheless, if the presumption were properly applied, one of these activities would have had to be inferred. Collins was the only witness to testify not only to possession, but also to any circumstances from which it might fairly be concluded that Burgess had purchased, sold, dispensed, or distributed a narcotic drug.

B. Judge Corcoran's Rulings

In denying defense counsel's request foraa missing witness instruction and ruling comment improper, the trial judge steered an erratic line through the criteria for applicability of the missing witness rule, restated by this Court in Wynn v. United States, supra, virtually on the eve of the instant trial, i.e. "where it is 'peculiarly within' the party's 'power to produce' the witness and where, we well the witness' testimony 'would elucidate the transaction'". 397 F.2d at 625.

On the basis of the testimony before hir, Judge Corcoran premised his ruling on a bizarre conception of how the testimony of the informer might elucidate the transaction. At the threshhold, he brushed aside the crucial role the informer might have played in testifying to the key elements of the prosecution's case referred to above, initially expressing doubt that the informer was an "eyeball witness" to the March 22 transaction* and holding his

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* It should be pointed out that, while the judge offered to "reopen the case right now at your [defense counsel's] request" and defense counsel declined the offer (Tr. 335), this occurred long after the court had ruled on the issue of the place of the informer's testimony in the case. The offer was made in the context of the issue subsequently treated, the informer's peculiar availability and in connection with the trial judge's offer to [illegible] issue a subpoena for the defense to bring in the informer, thereby to establish the informer's availability to the defense.

testimony merely "cumulative" to that of two or three agents who "saw the transaction happen." (Tr. 329). Subsequently, the judge again sidestepped the place of the informer in the prosecution's case (now recognizing the possibility that the informer was present at the first transaction), finding, however, that the testimony of the informer would indeed be "material", but directly acknowledging only his relevance to Burgess' alibi defense. (Tr. 330-1)

Appellant submits that this ruling, turning as it did on a somewhat anomalous concept of "materiality" was logically tortured and highly prejudicial, casting the informer's potential role as an alibi witness* rather than a witness for the prosecution. Moreover, the distortion was not cured by the blanket, but superficial, finding of "materiality", since recognizing the informer as material only to the defense laid the logical groundwork for holding him to be peculiarly available to neither side.

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* Judge Corcoran felt that no inference adverse to the government might be drawn from the witness' absence because he might have testified "I have never seen this man. I wasn't with him on the 22nd." (Tr. 334). This unrealistic postulate measures the prejudice of the judge's ruling because four government agents had placed the informant in Burgess' company on the two days in question. Obviously, the informant was principally pertinent not to whether Burgess was in Madison Square Garden or the Pig and Pit Restaurant, but to precisely what criminal acts he might have engaged in on March 22 and 24, 1967. Any other way of appraising the informant's role obviously shifts the burden of proof on the elements of crime away from the government onto the defendant, as defendant's counsel was careful to point out (Tr. 334-5).

So ruling the informant peculiarly available to neither side, Judge Corcoran denied the instruction and leave to comment. The ruling with respect to mutual availability was premised on the fact that the government had identified the witness, by name and approximate address at some time in the past, thus making him available for subpoena by the defense. Moreover, inasmuch as one agent (Fialkewicz) testified that he was not sure where the informant could be currently found, the judge suggested that the prosecution no longer had a comparative "edge" as to his availability (Tr. 331). The judge also felt that it might be unfair for the defense to go through a trial knowing where a key witness might be found and then "put the burden on the Government to produce--rather to ask for a missing witness instruction which gives you the right to comment." (Tr. 331-2). * As a fairer solution, the judge offered to reopen

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* The record also reflects a further possible consideration propounded by the prosecution, as to which neither the defense nor the judge made comment, that is "some danger of physical danger to the witness should he come in and testify in this case." (Tr. 337, 343-4). Possible physical danger to the informant, if it bears any logical relationship whatsoever to the missing witness issues, would appear to reflect far, far greater current availability of the witness to the prosecution than the defense. Were that consideration to have been validly applied to this case, tthe Government should have resorted to its privilege to protect the identity of its informant, recognized by the Supreme Court in Roviaro v. U.S., 353 U.S. 53 (1957). Wigmore points out, however, that the availability of such privilege is in fact dispositive of the peculiar availability of the witness to the party possessing the privilege:

> "But where the privilege is one which lies within the control of the party himself, it is obvious that the employment of the witness is in fact within the party's power; and thus, so far as the present principle is concerned, the inference might be justified." 2 J. Wigmore, Evidence (3d ed. 1940) §286.

the trial and grant a subpoena for the defense to produce the missing witness, which the defense declined. (Tr. 335).

C. Judge Corcoran Erred

Judge Corcoran's rulings misconceived both the purpose and the effect of the missing witness principle, in barring the defense from bringing a very telling point to the jury. By blocking out the pertinence of the informer's testimony to the aspects of the case on which the prosecution had the burden of proof and distorting the nature of the relationships between the parties and the informer, the appellant Burgess was deprived of a "substantial right". U.S. v. Jackson, 257 F.2d 41 (C.A. 3, 1958). Moreover, even if the testimony in the record had been insufficient to rule intelligently on these issues, the judge failed to conduct the particularized inquiry most recently prescribed by this Court in Stewart, supra.

As indicated, supra, there can be no question that the informer could have elucidated the prosecution's case. Comment by the defense as to his absence was every bit as appropriate (passing the issue of availability) as the prosecution's comments had been in Gass v. U.S. (No. 21,198, decided January 29, 1969), where the appellant named eight "distinctively defense witnesses" to his alibi whom he did not produce. Slip Opinion, 13-14. Conversely,

and in direct analogy to this case, this Court held in Stewart that the informant, Williams, who had been an accomplice in the robbery and who had led police to the appellant's initial identification and arrest,

> "undoubtedly could have shed a great deal of light on the matters in issue at the trial. And if indeed he had testified adversely to the Government, the jury's verdict might well have been different." No. 20,983, Opinion of Feb. 10, 1969, Slip Opinion, p. 7.

The key trial issue in Stewart was joined by an alibi defense, presented by testimony of his grandmother and a friend, which put in question the identity of the culprit. There, as here, the relevance of the informer was to whether the prosecution could substantiate its case through the informer's eyewitness testimony, not to whether the informer could testify in support of the alibi defense that he did not know the defendant and did not see the defendant on the day in question (Compare, Tr. 334).

Moreover, although there was some corroboration of the defendant's identity in Stewart, the prosecution there made essentially a one-witness case, dependent on the testimony of the complainant. Here, agent Collins alone testified as to the crucial elements of the prosecution's case, with respect to which there was no corroboration. Hence, the informer's testimony would not have been cumulative (T . 337), as was suggested by the government's

attorney*, but crucial to test the uncorroborated, damning testimony of Agent Collins. Compare, Lopez-Hernandez v. U.S., 324 F.2d 320 (C.A. 9, 1963), where the court held a narcotics informer a material witness under Roviaro, supra, where he had helped arrange a meeting between a narcotics agent and a smuggler and has participated in the negotiations.

The judge's rulings purported to turn on the availability of the informer, whom he held to be peculiarly available to neither side (Tr. 332, 334-5). On the basis of the evidence in the record, this conclusion flies in the face of the principles applied by this Court and of the results reached by other courts in identical circumstances.

These cases stress the necessity of a weighing of the relationships between the witness and the parties and condemn the indifference manifested here to the special employment relation and the close collaboration manifested by the informer and the prosecution.

In Egan v. U.S., 52 App. D.C. 334, 287 Fed. 953 (1923) this court held that the trial court erred in calling attention to the

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* Nor was the further consideration advanced by the prosecution for withholding the informer's testimony valid, that of possible physical danger to the informer. See footnote on page 17, supra.

defendant's failure to call two persons who "had no legal relation to the defendant in this case, and were equally available to the Government", 237 Fed. at 970 (emphasis added) -- implying that had there been such special relationship, failure to call would have been properly subject to comment.

In Milton v. U.S., 71 App. D.C. 394, 110 F.2d 556 (1940), this Court sanctioned comment on the failure of the appellant to call his employer as a witness, a woman who "stood in close relation to appellant Quantrille, within the meaning of our decision in the Egan case", notwithstanding likely physical availability to both parties. 110 F.2d at 559.

In Billeci v. U.S., 87 App. D.C. 274, 184 F.2d 394 (1950), the Court found a missing witness instruction not permissible where there was "nothing to show that these persons [other alleged gambling participants] were 'peculiarly available' to the defendants." 184 F.2d at 398. The Court pointed out, in a finding pertinent here, that an adverse inference could also not be drawn from the defendant's failure to call a police officer, "and certainly it could not be inferred that he was more readily available to appellants than to the prosecutor." 184 F.2d at 399.

Two subsequent cases, to the extent they are relevant, provide dimensions that are distinguishable. Richards v. U.S., 107

App. D.C. 197, 275 F.2d 655 (1960), a case where the illegal conduct of an informer, not called by the government, was set up as exculpating defense and the court doubted his testimony would have been helpful to the defense, appears explainable in large part by failure of counsel properly to object at trial; moreover, the case may have been questioned by the broadened doctrine applied recently in Stewart (Feb. 10, 1969 opinion), slip opinion 7-8. In Pennewell v. U.S., 353 F.2d 370 (1965) found comment improper where the missing witness not called by the defense could only, under the theories of the case, have incriminated the defendant.

As a body, these cases establish a general doctrine that the trial court should look to any special relationship existing between the witness and either of the parties. Cases from other circuits, in circumstances closely parallel to those here, establish that the court must recognize that such relationships establish "peculiar availability" to a particular party. Thus in McClanahan v. U.S., 230 F. 2d 919 (CA 5, 1956)*, in holding that the defendant's failure to call his own attorney had justified an unfavorable inference, the court cited the following applicable principle from Deaver v.

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* In his dissent in Richards, supra, Judge Bazelon indicated he felt that McClanahan had vitiated the force of the somewhat contrary view shown by another division of the Fifth Circuit in Shurman v. U.S., 233 F.2d 272. 275 F.2d 655, 660 (dissenting op.)

St. Louis Service Co., 199 S.W.2d 33, 35 (Mo. App, 1947), recognized by this court in Stewart (Feb. 10 opinion), slip opinion, p 8, fn 26:

> "It has been well said that 'the availability of a witness is not to be determined from his mere physical presence at the trial or his accessibility for the service of a subpoena upon him. On the contrary, his availability may well depend, among other things, upon his relationship to one or the other of the parties, and the nature of the testimony that he might be expected to give in the light of his previous statements or declarations about the facts of the case."

By this doctrine, the accessibility of a witness to a party's subpoena is of very little, if any, significance. In fact, a court's exclusive reliance on amenability to subpoena, which was here manifested, neatly guts the rule of all meaning, in that all the affected party need do to stave off the effect of the rule is to reveal the name of its witness. Such identification alone by the defense was obviously considered insufficient by this court in Gass, supra, slip opinion, p. 14, to avoid the applicability of the rule. And where the identification is as casual as is here shown in an ambiguous identification of the witness ("Danny Cox," Tr. 63, or "Daniel Cole," Tr. 135) and the imprecise description of his general whereabouts at some time in the past (the "700 block of Morton Avenue", Tr. 138), the loophole for the prosecution seems unfairly wide, especially in a case such as this which depends totally on one witness' testimony.

Instead, the nature of the relationship -- the "legal relation"

recognized in Egan, Milton, and Billeci -- should be determinative. Were the trial court here to have appropriately considered that factor -- reflected in the continuing undercover contacts between the informer and Agent Fialkewicz, who "used to go up there and meet him in the area" (Tr. 136) and who was in contact with him until a month and a half before the trial (Tr. 135), and in the fact suggested by all the government agents that the informer served as some kind of a go-between for Collins with Burgess (e.g. Tr. 15) -- the informer would clearly have emerged as a witness "peculiarly available" to the prosecution.

Indeed, such was the reasoned conclusion of the Court of Appeals for the Third Circuit in U.S. v. Jackson, supra, a sale of narcotics case, where the prosecution had argued that the defendant could have gone out and subpoenaed its paid informer. The Court held:

> "This argument misses the point. Although the Government concedes that the question is not one of mere physical accessibility, the argument made in effect denies the admission. In this case it is pretty clear that the informer, whose connection with the alleged sales were testified to by the main Government witness, was an important part of the building up of the case, in which the defendant's conviction occurred. The chief witness talked about 'Sarge' and how 'Sarge' had helped in the discovery of the law violation of the defendant. His presence was a natural part of the Government's case and certainly he was not the kind of witness that the defendant could be expected to call. We think that clearly his absence was a subject of proper and vigorous comment on the part of defense

> counsel. Cf. Nonci v. United States, 6 Cir. 1962, 127 F.2d 827, 830. To deny him the privilege of bringing this very telling point to the jury deprived him of a substantial right." 257 F.2d at 14.

Surely, that conclusion, drawn from a trial record at all fours with that here, compels the same result, reversal for prejudicial error.

This Court has recently given careful consideration to the procedural findings a trial court must make before it can dispose of the "peculiar availability" aspect of the missing witness issue. Stewart v. U.S., supra, where the Court ruled that

> "the rendition of a missing witness instruction must await an informed decision that the absent witness is peculiarly available to the side against which the instruction is asked. It clearly follows that absent some other reason for refusing the instruction, the trial judge must inquire suitably into the witness' availability." (Decision of Feb. 10, 1969), slip opinion, p. 7.

Moreover, Stewart counsels that determinations on this basis are appropriate only "upon full information as to ... availability to the parties, practically as well as physically." Id. Slip Opinion, p. 8. Appellant Burgess maintains that to the extent the record reflects the results of a "suitable inquiry", the conclusion must follow that the informer was peculiarly available to the prosecution, and the instruction and leave to comment were erroneously withheld.

If on appeal this conclusion be doubted, that would be because the trial judge made no effort to determine the precise practical or physical availability of the informer at the time of trial, although prosecution testimony established that one government agent did indeed have recurrent access to him up to at least a month and a half before the trial, and the desire to protect the informer demonstrated a continuing relationship. Nor were there any clear indications to dispel an otherwise proper inference such as were found to exist in Stewart, where it was shown that prior to trial the prosecution had made an effort to subpoena the witness, without success. (Opinion of July 10, 1969). Thus, the conviction of Appellant Burgess cannot be affirmed absent inquiry of the type conducted in Stewart and similarly disparitive findings.

Absent such findings, which the existing record of this case would suggest are not present in this case, Stewart is strong and fresh authority that the trial court's determinations were an abuse of its discretion, and that the conviction of Appellant Burgess is fatally defective and cannot stand.

II. THE EVIDENCE WAS INSUFFICIENT TO CONVICT THE DEFENDANT OF FACILITATING THE CONCEALMENT OF NARCOTIC DRUGS KNOWINGLY IMPORTED CONTRARY TO LAW PURSUANT TO 21 U.S.C. §174, ABSENT THE STATUTORY PRESUMPTION THEREIN, WHICH PRESUMPTION VIOLATES CONSTITUTIONAL PROTECTIONS OF DUE PROCESS, SELF INCRIMINATION, AND TRIAL BY JURY.

(Tr. 240-1, 364, 365)

Counts 3 and 6 of Appellant Burgess' indictment were for facilitating the concealment of narcotic drugs unlawfully imported into the United States, known to have been unlawfully imported, pursuant to 21 U.S.C. §174. With respect to the key elements of the offense--unlawful importation and knowledge of unlawful importation--no evidence whatsoever was introduced by the prosecution. Conviction rested solely on the presumption, embodied in the judge's instructions to the jury (Tr. 365) which was drawn from the second paragraph of the statute--

> "Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

The Supreme Court has recently held unconstitutional a "virtually identical" presumption applied to another narcotic drug (Marihuana). Leary v. United States, 394 U.S. , 89 Sup.Ct. 1532, 1552, decided May 19, 1969. The decision in Leary held that the statutory presumption, insofar as it displaced requirement for proof

that the defendant knew the drug to nave been unlawfully imported, violated due process of law, and raised, though it did not need to dispose of, the possibility that the presumption further violated due process with respect to the requirement for proof of unlawful importation. By the same measure the presumption in the instant case violated due process under the Fifth Amendment. Moreover, by coercing the Appellant to testify and thus expose himseof to further prosecutions, to explain "possession to the satisfaction of the jury", the presumption violated the Appellant's right to be free at trial from self-incrimination under the Fifth Amendment. Finally, by excising the core of the statutory offense from the prosecution's responsibility for proof, the presumption operated to deny appellant Burgess his right to trial by jury, guaranteed by Article III and the Sixth Amendment to the Constitution.

At the close of the prosecution's case, the defense moved for a directed verdict of acquittal, on grounds that the prosecution had introduced insufficient evidence as to all the elements of the offenses charged to go to the jury (T. 240-1). The motion was denied, and the case went to the jury upon the statutory presumption, thus squarely raising the sufficiency of the evidence to convict absent the unconstitutional shortcut*.

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* For a discussion of additional grounds for review of the constitutional issues here raised on appeal, see IIIC, infra. Pertinent here are numerous recent Supreme Court decisions opening

A. The Statutory Presumption Violates Due Process of Law

The statutory presumption of 21 U.S.C. §174, for many years protected from due process challenge by the holding of Yee Hem, supra, that the presmrption is reasonable applied to smoking opium has recently been fundamentally shaken by the Supreme Court's decision in Leary, supra, regarding the "virtually identical" presumption applied to marihuana in 21 U.S.C. §176a. The Court was careful to reserve the final downfall of Yee Hem for a later case, stating that "we intimate no opinion whatever about the continued validity of the presumption relating to 'hard' narcotics, 89 S.Ct. at 1553, fn. 92, but it pointed to a fatal flaw in the reasoning of Yee Hem--the failure to consider that "it is incumbent upon the prosecution to demonstrate that the inference [of statutory violation] is permissible before the burden of coming forward could be placed upon the defendant", 39 S.Ct. at 1553, according to the holding of the Supreme Court in Tot v. United States 319 U.S. 463, 469.

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up constitutional issues on review in cases where the trial antedated land-mark Supreme Court decisions, e.g. Miranda v. Arizona, 334 U.S. 436, 496 (1966); O'Connor v. Ohio, 385 U.S. 92, 93 (1966); Curtis Pub. Co. v. Butts, 338 U.S. 136, 195 (1967); and Grosso v. U.S., 390 U.S. 62, 71-2 (1967). The analogy here is completed by reference to Yee Hem v. U.S., 268 U.S. 173 (1925) which had upheld the instant presumption against constitutional challenge as enabling an unreasonable and illogical inference, and Leary, supra, not decided until after the November 1967 trial here, which dispelled Yee Hem's earlier finding of constitutionality. Indeed, in Hoskins v. U.S. (renumbered No. 67, October Term 1969)

The teaching of Tot was controlling in Leary's invalidation of the statutory presumption relating to marihuana, and was quoted with favor at 1547--

> "Under our decisions a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience. This is not to say that a valid presumption may not be created upon a view of relation broader than a jury might take in a specific case. But where the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them it is not competent for the legislature to create it as a rule governing the procedure of courts." 319 U.S. at 467-8.

See also U.S. v. Gainey, 380 U.S. 63 (1965) and U.S. v. Romano, 382 U.S. 136 (1965). Where Yee Hem's finding of reasonableness in the legislative design of Section 174 was premised on its view that the person who obtains an "outlawed commodity' may reasonably be required to rebut at his peril "the natural inference of unlawful importation or your knowledge of it.." 268 U.S. at 134. Leary "refus[ed] to follow this aspect of the reasoning in Yee Hem" 89 S.Ct. at 1553, fn. 92, and flatly endorsed the view expressed in Tot that the prosecution must demonstrate the inference is rationally permissible before the presumption may be applied.

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now pending on petition for certiorari to the Court of Appeals for the Seventh Circuit (op. below sub nom U.S. v. Hoskins, 406 F.2d 72 (1969)), conviction under the instant statute was challenged for the first time in the appellate court on Fifth and Sixth Amendment grounds.

The prosecution in this case has fallen into the same pitfalls with respect to marihuana that defeated the government's case in Leary. The presumption was essential to conviction because no evidence was introduced to show that the heroin Burgess is alleged to have sold was unlawfully imported, and that Burgess knew the drug to have been unlawfully imported--central elements of the charge. Under Leary's restatement of the applicable measure of constitutionality, the Government should have introduced evidence "to demonstrate that the inference was permissible before the burden of coming forward"--the burden of satisfactorily explaining possession--"could be placed upon the defendant". 89 S.Ct. at 1553.

Appellant submits that without such a showing in this case to substantiate the inferences of unlawful importation and knowledge thereof it was error to allow the case to go to the jury on the presumption, and the conviction cannot be sustained on appeal. Moreover, there are compelling indications that the reasonableness of both inferences cannot meet the "rational connection" test restated in Leary--

> "The upshot of Tot, Gainey and Romano is, we think, that a criminal statutory presumption must be regarded as 'irrational' or 'arbitrary', and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." 89 S.Ct. at 1543.

Can it be said "with substantial assurance" that unlawful importation and Burgess' knowledge of unlawful importation flow from his mere possession of heroin?

With respect to unlawful importation of the heroin in Burgess' possession, a number of very real alternatives are available to vitiate "substantial assurance" of its unlawful importation. Although the judge correctly charged--

> "It is unlawful to import or bring any narcotic drug into the United States except such amounts of crude opium, coca leaves, as the Commissioner of Narcotics is authorized to prescribe by regulation, and no crude opium may be imported or brought in for the purpose of manufacturing heroin" (Tr. 364) (21 U.S.C. §173) --

this charge by no means encompasses all the possible alternative origins of the heroin in Burgess' possession. Other alternative origins, each of which represents a reasonable (if not inevitable) source, include:

1. Lawful Importation of Heroin. As the Court of Appeals for the Ninth Circuit said in Hernandez v. United States, 300 F.2d 114 (1962):

> "[I]t cannot be said that all heroin now outstanding in this country is in fact illegally imported since Congress in 1960 enacted a statute providing: 'Notwithstanding the provisions of ... any other law, the Secretary [of the Treasury]... may in his discretion authorize the importation of any narcotic drug... for delivery to officials of the United Nations, of the Government of the United States, or of any of the several States, or to any person licensed or qualified to be licensed under section 8 of this Act, for scientific purposes only.' Act of April 22, 1960, §16, 74 Stat. at page 67 (21 U.S C.§513,

See S. Rep. No. 1077, 86th Cong., 2d Sess, 2 U.S.Cong. & Ad. News 1960, at page 1387." 300 F.2d at 119, fn. 11.

See also 21 C.F.R. §306.3, which lays down discretionary authority under which the Director, Bureau of Narcotics and Dangerous Drugs, may make heroin domestically available. Of course, strict construction of a penal statute would not warrant prosecution for illegal importation, if Burgess were to have come by such heroin without an appropriate scientific-purposes-only license.

2. Lawful Importation of Source Material, Subsequent Deviation and Manufacture Into Heroin.

Although the judge's charge correctly stated that no crude opium may be imported for the purpose of manufacturing heroin, deviation after lawful importation would not necessarily violate the import control statute. For example, in the year 1967, according to the U.S. Treasury, Bureau of Narcotics, there were 2,181 thefts of narcotic drugs totalling 145.89 kg. in weight, a new record quantity. U.S. Bureau of Narcotics, Report on the Traffic in Opium and Other Dangerous Drugs (1967), p. 22. The same report lists a considerable volume of lawful domestic processing of convertible opium derivatives, 3,713 kg. of medicinal opium and 715 kg. of morphine (1966 figures), Id. at 41. The final step in the process, manufacture of heroin from opium or morphine, is a simple and well-known chemical process--

> "Raw morphine can be refined and converted into almost pure heroin (90 to 97 per cent) with relatively simple means and material with the help of products the sale of which is uncontrolled, and without the need for any special adaptation of the premises used; in this way many kilos can be produced weekly.
>
> "A bathroom or kitchen fitted with town gas or butane gas or with electricity is sufficient for the purpose." See C. Vaille and E. Bailleul, "Clandestine Heroin Laboratories," in Bulletin of Narcotics (United Nations), Vol. V., no. 4, Oct-Dec. 1953, p. 1.

That these processes are not unknown to heroin dealers in the U.S.--and to the Bureau of Narcotics as well*--is reflected in the candid official U.S. report of a particular seizure of five ounces of high-grade heroin "believed to have come from a clandestine laboratory." Report on Traffic in Opium and Other Dangerous Drugs (1946), p. 19. See also Report on Traffic in Opium and Other Dangerous Drugs (1954), p. 4.

3. Domestic Production of Opium and Manufacture into Heroin. Though official statistics of domestic growth of the opium poppy do not appear to be currently reported, the amenability of the plant to cultivation has long been recognized and was a prime target of Congressional enactment of the taxing provisions of the Harrison Narcotics Act of 1914 (26 U.S.C. §4701). Justifying that tax, Congressman Harrison said--

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* Note that the prospect of domestic manufacture is also within the regulatory scheme of §2 of the Uniform Narcotic Drug Act, e.g. 33 D.C. Code §402.

> "The act approved Feb. 9, 1909 prohibits the importation of opium except for medicinal purposes, and so makes it illegal for any one to import crude opium into the United States and so manufacture smoking opium. But it is possible for those desiring to do so to cultivate the poppy in several of the states (notably those of the Pacific slope), produce opium therefrom, and under the Act of October 1, 1890, secure a license and manufacture such domestically produced opium into smoking opium for local consumption and interstate traffic. Owing to the high price which smoking opium now commands as the result of its legal exclusion from the U.S. certain persons have declared their intention of producing opium in the U.S. and manufacturing it into smoking opium. Should this intention be carried out it would be a direct defeat of the chief object of the Act....,and may be checked by so amending the Act of October 1, 1890 as to impose a prohibitive internal revenue tax on all smoking opium manufactured in the United States from domestic crude opium..." H. Rep. 22, 63d Cong., 1st Sess., 1913, p. 1-2.

Moreover, to provide further teeth to controls over domestic production, Congress enacted the Opium Poppy Control Act of 1942, 21 U.S.C. §§188 et seq. providing a comprehensive licensing scheme for domestic production of the opium poppy. For indication that evil Congress intended to curb has nonetheless continued, note the misfortunes of the defendant in Az Din v. U.S., 232 F.2d 283 (C.A. 9, 1956) cert. den. 352 U.S. 827 (1956). See also Stutz v. Bureau of Narcotics, 56 F.Supp. 310 (N.D.Cal., 1944).

Thus, derived from either licensed or unlicensed domestic growth, the possibility of 100% domestic production is not to be discounted.

4. Domestic Synthesis of Heroin. For an ingenious, but no less relevant, example of an effort to synthesize morphine and cull

opium from unregulated substances, see Liss v. U.S., 137 F.2d 996 (1943), cert.den. 320 U.S. 772(1943).

All of the foregoing represent illustrative ways in which the heroin in Appellant Burgess' possession other than by unlawful importation. Together they cumulate to vitiate the "substantial assurance" which Leary requires must underly the inference of unlawful importation from mere possession. It may be that the probabilities substantiate the presumption infact, but this record provides absolutely no basis for such an inference, which Leary teaches, cannot therefore be sustained.

Moreover, upon such showing of the unsubstantial basis for the presumption of unlawful importation, Leary dictates that the presumption of knowledge must also fall, unless the Court can be persuaded that

> "a majority of [heroin] possessors either are cognizant of the apparently high rate of importation or otherwise have become aware that their [heroin] was grown abroad." 89 Sup.Ct. at 1553-4.

This record is similarly devoid of any indication of Appellant Burgess' knowledge, as it also is of any profile of the knowledge of the nation's heroin-possessing population. Without such foundation, Leary holds, the presumption "cannot be upheld without making serious incisions into the teachings of Tot, Gainey and Romano;" nor, thereupon, can this court "escape the duty of setting aside

petitioner's conviction" 89 S.Ct. at 1556-7 with respect to 21 U.S.C. §174.

B. The Statutory Presumption Violates the Fifth Amendment Privilege Against Self-Incrimination.

The appellant Burgess did not testify at his trial and hence offered no evidence, as prescribed in Yee Hem to "rebut...the natural inference of unlawful importation, or [his] knowledge of it." 268 U.S. at 184. The result was predictable conviction since possession was not explained to the "satisfaction" of the jury and the jury was otherwise instructed that it may convict on possession and nothing more. That result, which penalizes the silence of the defendant, violates the constitutional protection against self-incrimination both with respect to this charge against him* and any other charge which might have been brought upon the basis of the acknowledgment of possession which he would have had to make to rebut the inferences of knowledge and unlawful importation.

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* This issue is currently posed in Turner v. U.S. (No. 190, 1969 Term), as to which certiorari was granted June 2, 1969, 37 L.W. 3453. Moreover, the same issue, the jeopardy to the defendant's constitutional rights to remain silent arising in capital trials where a jury determines both guilt and sentence, is currently presented for determination by the Supreme Court in the "capital punishment case" Maxwell v. Bishop, cert.granted 37 L.W. 3219, (No. 622, Oct. Term 1968); See New York Times, July 23, 1969, p.1.

With respect to the operation of the presumption to incriminate Burgess in this case, Mr. Justice Black denounced sirilar presumptions, of ownership and proprietorship from mere presence at a still, in Tot Heiney, supra. He said, in terms directly applicable here,

> "These statutory presumptions must tend, when incorporated into an instruction, as they were here, to influence the jury to reach an inference which the trier of fact might not otherwise have thought justified, to push some jurors to convict who might not otherwise have done so. Cf. Pollock v. Williams, 332 U.S. 4, 15, 33 L.ed. 1095, 1102, 64 S.Ct. 792. The undoubted practical effect of letting guilt rest on unexplained presence alone is to force a defendant to come forward and testify, however much he may think doing so may jeopardize his chances of acquittal, since if he does not he almost certainly destroys those chances. This is compulsion, which I think runs counter to the Fifth Amendment's purpose to forbid convictions on compelled testimony. I am aware that this Court in Yee Hem v. United States ...[supra] held that use of a presumptive squeeze like this one did not amount to a form of compulsion forbidden by the Fifth Amendment. The Court's reasoning was contained in a single paragraph, the central argument of which was that despite a presumption like this a defendant is left 'entirely free to testify or not as he chooses.' That argument, it seems tome, would also justify admitting in evidence a confession extorted by a policeman's pointing a gun at the head of an accused, on the theory that the man being threatened was entirely free to confess or not, as he chose. I think the holding in Yee Hem is completely out of harmony with the Fifth Amendment's prohibition against compulsory self-incrimination, and I would overrule it..." 330 U.S. at 37-8 (dissenting opinion).

Recognition by a majority of the court of the same principle has recently been strongly expressed in Griffin v. California, 330 U.S. 609 (1965), where comment by the prosecution on the defendant's silence was held violative of his self-incrimination protection, because the rule permitting such comment "is a penalty imposed by

courts for exercising a constitutional privilege," a penalty which "cuts down on the privilege by making its assertion costly." 390 U.S. at 614. Similarly, the Court voided the portion of the Federal Kidnapping Act, 18 U.S.C. 1201a privding the death penalty if the jury so recommended, in U.S. v. Jackson, 390 U.S. 570, since it worked to discourage "assertion of the Fifth Amendment right not to plead guilty, and thereby to "chill the assertion of constitutional rights by penalizing those who choose to exercise them..." 390 U.S. at 531.

The privilege against compulsory self-incrimination is "as broad as the mischief against which it seeks to guard." Counselman v. Hitchcock, 142 U.S. 547, 562 (1892) and "... the privilege is fulfilled only when the person is guaranteed the right to remain silent unless he chooses to speak in the unfettered exercise of his own will." Malloy v. Hogan, 378 U.S. 1, 8 (1964); Miranda v. Arizona, supra. By these standards, the instant presumption ineluctably works to penalize the defendant for his silence. Moreover, even the effort at even-handedness shown by the trial judge in this case in instructing the jury that the statutory presumption does not shift the burdens of proof is to be condemned as "subtly compelling" judicial condemnation when coupled with the awesome instruction that "some particular factual inference has been enshrined in an Act of

Congress," as Mr. Justice Douglas indicated in his dissent in Gainey, 369 U.S. at 72-3. Under such a change, Mr. Justice Black pointed out, "Few jurors could have failed to believe it was their duty to convict..." Id at 77. In principle and in practical effect, the "presumptive squeeze" of the statute violated the Appellant's Fifth Amendment right to be free from self-incrimination.

Moreover, it should also be pointed out that the effects of testimonial compulsion reach beyond potential conviction in this case, to prosecution for failure to register and pay the Federal occupational tax required of all possessors of narcotic drugs, 26 U.S.C. §4724, as to which mere possession is presumptive evidence, and possession itself under local law, 33 D.C. Code §402. For the defendant to overcome the presumption in prosecution under 21 U.S.C. §174 with respect to unlawful importation and knowledge thereof, he must acknowledge possession of a narcotic drug. Even if successful in the Federal prosecution, he would thereafter be subject to re-charging on the basis of the admissions of possession theremade, and acquittal would not protect him from double jeopardy. See, e.g. Bartkus v. Illinois, 395 U.S. 121 (1959). Thus the constitutional privilege would be further violated.

C. The Statutory Presumption Operates to Deprive the Defendant of Trial by Jury

In his dissent in Gainey, Mr. Justice Black found that the use of statutory presumptions

> "seriously impaired Gainey's constitutional right to have a jury weigh the facts of his case without any congressional interference through predetermination of what evidence would be sufficient to prove the facts necessary to convict in a particular case." 380 U.S. at 81.

Such interference, he found, violated the right to trial by jury guaranteed by Article III, §2, and the Sixth Amendment of the Constitution, relying on Bailey v. Ala., 219 U.S. 219 (1911) where a state statute was invalidated which provided that failure to provide services contracted and paid for or to refund money would be prima facie evidence of intent to defraud.

The same principle served as grounds for Justice Black's concurrence in Leary where he held that Congress cannot tell juries to convict on "any such forced and baseless inference" as the presumption there--and here- invoked. 89 S.Ct. at 1558.

Here the vice of depriving the accused of the right to have jury weigh the central elements of the charge brought against him should similarly defeat any conviction premised on such "forced and baseless inference."

III 26 U.S.C. §§4704a AND 4705a, INDIVIDUALLY AND AS PART OF A BROAD STATUTORY SCHEME, COMPEL SELF-INCRIMINATION, CONTRARY TO THE FIFTH AMENDMENT

(Tr: None)

Appellant's convictions on counts 1 and 4 -- for transfer of narcotic drugs without a written order on an official order form pursuant to 26 U.S.C. §4705a -- and on counts 2 and 3 -- for sale of narcotic drugs not in or from the original stamped package, pursuant to 26 U.S.C. 4704a -- were accomplished within a statutory scheme that the Supreme Court in Leary, supra, declared confronts defendants with a constitutionally fatal choice between self-incrimination or non-compliance. Individually, as well, these statutes violated the Appellant's right to remain silent. Moreover, nothing in this case can be construed as constituting a waiver of Appellant's rights to raise these constitutional claims.

A. The Sections are Part of a Comprehensive Narcotics Control Scheme that Violates Appellant's Fifth Amendment Right to be Free from Self-Incrimination

The two statutory sections here in question are a part of a comprehensive regulatory scheme embodied in the Harrison Act, applying a regime of taxation and disclosure to every critical element in the chain of commerce in these commodities. The

principal statutory controls in Title 26 are, in summary, the following:

1. Commodity tax -- Section 4701a requires a tax to be paid on every narcotic drug, regardless of origin, by the importer, manufacturer, producer or compounder (Section 4701b), with certain exemptions (Section 4702). Evidence of payment of tax is to be in the form of stamps affixed to the container. (Section 4703). Section 4704a makes it unlawful to purchase, sell, dispense or distribute narcotic drugs without the stamps affixed.

2. Registration and occupational tax -- Section 4721 imposes an annual occupational tax on "every person who imports, manufactures, produces, compounds, sells, deals in, dispenses, or gives away narcotic drugs, varying according to category of occupation. Section 4722 requires each person who engages in a business within the coverage of Section 4721 to register annually. Section 4723 bars possession of "any original stamped package containing narcotic drugs by any person who has not registered and paid" the occupational tax. Section 4724 makes unlawful the carrying on of any occupation subject to the occupational tax without paying the tax and, inter alia, similarly bars possession by any person who has not registered and paid the occupational tax of any narcotic drug.

3. Transaction controls -- Section 4705 makes it unlawful to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of a person to whom the Secretary of the Treasury has issued, in blank, an official order form. (Section 4704a). Each person who receives a form must preserve the form for inspection for a period of two years (Section 4704d). Forms shall be sold only to persons identified to the Secretary, whose names are to be entered on the form and recorded in the Secretary's records, and no one else may use such forms. (Section 4704f). Narcotics obtained by use of such forms may be used only in a lawful business or legitimate practice of a profession. (Section 4705g). Inspection of duplicate order forms, retained by the Secretary (Section 4704e) and order forms preserved by transferors is open to Federal and State law enforcement officials (Section 4773).

Appellant has been convicted of violating two aspects of this statutory scheme -- sale of narcotic drugs without the stamps evidencing payment of the commodity tax and transfer of narcotic drugs without receipt of the written order form. When seen in context of the overall statutory scheme, it is apparent that the vices of compulsory self-incrimination struck down by the Supreme Court in Albertson v. SACB, 382 U.S. 70 (1965), Marchetti v. United States, 390 U.S. 39 (1968), Grosso v. United States, 390 U.S. 62 (1968), Haynes v. United States, 390 U.S. 85 (1968), and Leary, 89 Sup Ct. at 1535-1542, are fully present in the application of these statutes to Appellant Burgess.

For it is clear, with respect to the absence of tax stamps on heroin in his possession, that the tax stamps are an essential aspect of the registration and occupational tax provisions of the Harrison Act. If Appellant Burgess himself had imported, manufactured, produced, or compounded the heroin in his possession, he would have had to identify himself to Federal Revenue officials, for the purpose of paying the commodity tax himself, (section 4701b, and thus forced himself to register and pay the occupational tax pursuant to Sections 4721 and 4722. Had he acquired the heroin from the commodity taxpayer, the transfer could only have been lawfully accomplished pursuant to a written order form which Burgess would have had to secure pursuant to

Section 4705a, a requirement specifically condemned in Leary, supra, and which would moreover have made Burgess directly liable for failure to register and pay the occupational tax. Indeed, however possession of narcotics in stamped packages had been acquired, Burgess would have had to pay the occupational tax, pursuant to the requirement of Section 4723 and hence register as required by Section 4722.

Section 4704a under which Burgess was tried and convicted is, hence, nothing more than a satellite device for the registration and occupational tax provisions. In the light of appellant's exposure to prosecution for possession and sale of a narcotic drug under applicable District of Columbia law, 33 D.C. Code §402(a), appellant's conviction under 26 U.S.C §4704a is indistinguishable from the conviction in Haynes v. United States, supra, where the Supreme Court invalidated a conviction under the similarly interrelated provisions of the National Firearms Act. In Haynes the Court held that a statute that makes unlawful possession of an unregistered firearm, 26 U.S.C. §5851, is not properly distinguishable from a statute which requires registration or possession of a firearm, 26 U.S.C. §5841, and that the registration or possession would expose the registrant to prosecution under state law. 390 U.S. at 90-95.

While the vices of the written order provision of 26 U.S.C.

§4705a in its own terms are discussed separately in the subsequent section, its relevance to the comprehensive control scheme premised on registration of all participants cannot be overlooked. As the Supreme Court found in Leary, with respect to a transferee of marihuana under a similar written order provision in 26 U.S.C. §4742 was directed against a "select group inherently suspect of criminal activities." 89 S.Ct. at 1538, citing Albertson v. SACB, 382 U.S. at 79. Although that target group was, within the holding of the Leary case, limited to the transferee of a narcotic drug, the practical effect of the scrutiny directed at the transferee surely embraces his transferor as well. Thus, to the extent the requirement for the written order form works to require that the transferee be identified and exposed to the constitutionally defective requirement of registration, the transferor is also exposed to public scrutiny (see Arg IIIB), and his parallel liability to register and pay the occupational tax is invoked. 21 U.S.C. §4724. Again, the buttressing effect of a related statute to a statute compelling incriminating registration is condemned by the Haynes doctrine.

In short, both statutes -- Section 4704a, applying to the transfer to Appellant Burgess and Section 4705a focussing on the transfer from Burgess -- mask registration and occupational tax requirements which Albertson, Marchetti, Grosso, Haynes, and

Leary have all condemned as violative of the Fifth Amendment. The purpose of the registration provision -- announced by its original sponsors in 1913 as a device to meet the

> "real, even desperate, need of Federal legislation to control our foreign and interstate traffic in habit-forming drugs, and to aid both directly and indirectly the States more effectually to enforce their police laws". H. Rep. 23, 63d Cong, 1st Sess, p 1 (emphasis added)

--having been condemned by the Supreme Court, must bring down the statutory framework by which Appellant was convicted.

B. Individually, Sections 4704a and 4705a Violate Appellant's Privilege Against Self-Incrimination

Much as the overall statutory control scheme must now be condemned, the line of cases culminating in Leary similarly requires that, individually, Sections 4704a and 4705a be voided, as violative of appellant Burgess' rights against self-incrimination. In addition to the defects indicated in IIIA, supra, Section 4704a violates the privilege at trial through the statutory presumption therein, and Section 4705a is contrary in its terms to the guarantee.

Section 4704a includes, in addition to the prohibition of transactions in narcotic drugs not in the original stamped package, the following statutory presumption --

> "....the absence of appropriate taxpaid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found."

In its practical effect, this presumption operates just as the presumption in 21 U.S.C. §174, to confront the defendant at trial with the incriminatory dilemma of keeping silent with respect to any explanation he might offer as to how he came by drugs without tax stamps, and making such an explanation, thus opening himself up to further prosecution, whether it be under Federal law for failing to register and pay the occupational tax as required by Section 4724 on a mere showing of possession, or under District of Columbia Law, for possession itself, 35 D.C. Code §402.* See U.S. v Gainey, supra; Griffin v. California, supra; and United States v. Jackson, supra.

Moreover, Section 4704a, the section requiring receipt of a written order, operates in its terms contrary to the principles established in the Marchetti, Grosso, Haynes and Leary cases.

Under Section 4705 and regulations thereunder (26 C.F.R. §151.141) the buyer furnishes the supplier-seller an order form issued in triplicate. The supplier-seller (also referred to as consignor or vendor) must enter upon the form the number and size of the stamped packages furnished on each item that is

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*This issue with respect to Section 4704a is currently presented to the Supreme Court in petitioner's brief in Turner v. United States, No. 190, October Term 1967, supra.

ordered, and the date when each item is filled. "A notation covering each shipment, showing the actual quantities supplied and the date of delivery shall be made by the vendor on the original and triplicate, and by the vendee on the duplicate." (26 C.F.R. §151.133)

The original of the order form must be kept by the vendor for two years, and at the end of each month the triplicate must be forwarded to the narcotic supervisor (26 C.F.R. §151.201). The copy held by the vendor must be available for inspection by an authorized employee of the Treasury Department, and any state official charged with enforcement of the narcotic laws. (26 U.S.C. §§ 4705d, 4773)

To require petitioner to transfer narcotics pursuant to an order form compels him to incriminate himself because of the entries that he, in his position as the vendor or transferor under the statutory scheme, must make on the order form. He must acknowledge that he possessed narcotics (unlawful under 4724c, if he has not registered) and that he supplied narcotics, outside the original stamped package (unlawful under 26 U.S.C. §4704), the quantities involved and date on which the transfer took place. This would be an admission of unlawful transfer since petitioner was not, and could not be registered pursuant to Section 4722, and, of course, had not paid the tax. Further,

the order form would have been available for inspection by both federal and state narcotics officials and could be used in evidence at a trial for narcotics laws violations.

If petitioner had complied with the statutes, his position would have been comparable to the defendants in Marchetti, Grosso and Haynes had they complied with the gambling and gun registration laws involved in those cases. Thus, petitioner faced a "real and appreciable danger" of self-incrimination, a danger which must be measured, Marchetti emphasized, according to realities, viewing " onstitutional commands as 'organic living institutions,' whose significance is 'vital not formal.' Gomers v. United States, 223 U.S. 304, 310." 390 U.S. at 53.

Thus Marchetti rejects the basis on which the Second Circuit has twice sought, prior to Leary, to preserve the written order requirement, insofar as it affects a transferor of narcotic drugs, from Fifth Amendment condemnation. U. S. v. Minor, 398 F2d 511, (C.A. 2d, 1968), cert. granted June 2, 1969, 37 LW 3453 (No. 189, October 1969 Term). Buie v. United States, 407 F2d 505 (C.A. 2d, 1969), cert. granted June 2, 1969, 37 LW 3453 (No. 271, October, 1969 Term).* In the later case, Buie,

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*It may well be that the determinations of the Second Circuit in Minor and Buie, can best be understood in the light of the concluding observation of Judge Kaufman in Minor --

the written order form (applicable to marihuana under 26 U.S.C. 4742a was upheld insofar as it affects the transferor, on grounds that the danger of self-incrimination is not invoked since the seller must not do something revealing as a condition of sale, as would be the case if, for example,

> "the statute required both the buyer and seller to write their names on the written order form in advance of the proposed sale." 407 F2d at 703-7.

But Marchetti has specifically rejected such a narrow chronological distinction, and embraces the situation here where acceptance of a written order is itself the threshhold of self-incrimination. Thus, the Supreme Court said --

> "The central standard for the privilege's application has been whether the claimant is confronted by substantial and 'real', and not merely trifling hazards of incrimination ...This principle does not permit the rigid chronological distinction adopted in Kahriger [U.S. v Kahriger, 345 U.S. 22 (1953)], and Lewis [Lewis v. U.S., 348 U.S. 419 (1954)]. We see noreason to suppose that the force of the constitutional prohibition is diminished merely because confession of a guilty purpose precedes the act which it is subsequently employed to evidence. Yet, if the factual situations in which the privilege may be claimed were inflexibly

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> "It is not our function to anticipate changes of doctrine and thus render ineffective a vital statutory scheme designed by the Congress to regulate the potentially dangerous traffic in narcotic drugs." 393 F2d at 516.

These cases, decided prior to Leary, ploughed a familiar path. They are currently tentatively set for oral argument before the Supreme Court, in the light of Leary, during the week of October 13, 1969.

> defined by chronological formula, the policies which the constitutional privilege is intended to serve could easily be evaded. Moreover, although prospective acts will doubtless ordinarily involve only speculative and insubstantial risks of incrimination, this will scarcely always prove true." 390 U.S. at 53-54.

Directly embraced within this chronological realism is the failure to accept a written order form--- to avoid the consequent dilemma that records would thereby be created, to preserve and publicize evidence of criminality, pursuant to 26 U.S.C. §4705, or else the order form destroyed, thus violating the statute.

These hazards can only be appraised in the light of consideration of the consequences of "'literal and full compliance' with all the statutory requirements," Grosso v. U.S., 390 U.S. at 65, citing Albertson v. SACB, 382 U.S. at 78, embracing the avoidance of a written order form fully within the protections of the Fifth Amendment privilege. In the light of the ease with which the privilege may be waived for failure of timely invocation, see e.g. Rogers v. U.S., 340 U.S. 367 (1951), Appellant Burgess had no choice but to eschew the written form if he wished to preserve his right to avoid incrimination.

C. Appellant's Constitutional Claims Were Not Waived

Although the determinations of the trial court did not turn on constitutional issues, these issues are fully ripe for review here. The trial was held in this case in November 1967,

prior not only to the determination by the Supreme Court in Leary, but also in the January 1968 self-incrimination trilogy, Marchetti, Grosso, and Haynes. Numerous Supreme Court decisions -- for example, Miranda, supra; O'Connor, supra; and Curtis Pub. Co., supra -- have all supported the raising of issues on appeal for the first time that had been foreclosed by standing cases.

In addition, both Grosso, 390 U.S. at 70-75, and Leary, 89 S.Ct. at 1543-4 have denied contentions that constitutional rights had been waived, indicating the clear disposition by the Supreme Court that new standards of constitutional interpretation be applied to cases in this area whose appeals are not yet final.

Thus, even aside from this Court's curative powers, see, e.g. Payton v. United States, ___App. D.C., ___, 222 F2d. 794 (1955), this Court has ample reason to hear and determine these substantial constitutional claims.

CONCLUSION

For the foregoing reasons, this Court should reverse the convictions of Appellant Burgess.

Respectfully submitted.

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(Appointed by this Court)

CERTIFICATE OF SERVICE

I hereby certify that I have this 14th day of July, 1969, served a copy of the foregoing Brief for Appellant, upon the United States Attorney by personal delivery.

Steven R. Rivkin

STATUTORY APPENDIX

21 U.S.C. §174

"Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000...

"Whenever on trial for a violation of this section the defendant is shown to have or have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury..."

26 U.S.C. §4704a

"...It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate taxpaid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found."

26 U.S.C. §4705a

"...It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary or his delegate."

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U. S. Constitution, Article III, §2

"The Trial of all Crimes...shall be by Jury..."

U.S. Constitution, Amendment V:

"No person...shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law..."

U.S. Constitution, Amendment VI:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury... and to be informed of the nature and cause of the accusation; [and] to be confronted with the witnesses against him..."